

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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|---------------------|--------------------------------|
| DERIOUS J. JOHNSON, | § |
| | § No. 583, 2009 |
| Defendant Below- | § |
| Appellant, | § |
| | § Court Below—Superior Court |
| v. | § of the State of Delaware |
| | § in and for New Castle County |
| STATE OF DELAWARE, | § Cr. ID No. 9709002535 |
| | § |
| Plaintiff Below- | § |
| Appellee. | § |

Submitted: November 10, 2009

Decided: December 7, 2009

Before **STEELE**, Chief Justice, **JACOBS** and **RIDGELY**, Justices

ORDER

This 7th day of December 2009, upon consideration of the appellant's opening brief and the appellee's motion to affirm pursuant to Supreme Court Rule 25(a), it appears to the Court that:

(1) The defendant-appellant, Derious J. Johnson, filed an appeal from the Superior Court's September 17, 2009 order denying his second motion for postconviction relief pursuant to Superior Court Criminal Rule 61.¹ The plaintiff-appellee, the State of Delaware, has moved to affirm the

¹ The Superior Court's denial of Johnson's first postconviction motion was affirmed by this Court. *Johnson v. State*, Del. Supr., No. 56, 2009, Holland, J. (June 23, 2009).

Superior Court's judgment on the ground that it is manifest on the face of the opening brief that the appeal is without merit.² We agree and affirm.

(2) In September 1997, Johnson was arrested on drug charges. Because Johnson was a minor, the charges were filed in Family Court. Following an amenability hearing, the case was transferred to the Superior Court. In May 1998, Johnson pleaded guilty to Possession With Intent to Deliver Heroin. He was sentenced to the boot camp diversion program, twice found in violation of probation, and discharged as unimproved in March 2001. In January 2001, Johnson pleaded guilty to Robbery in the First Degree. In October 2003, Johnson was convicted of Rape in the First Degree and sentenced to life in prison as a habitual offender. One of the prior felony convictions used to establish Johnson's habitual offender status was his 1998 drug conviction.

(3) In this appeal from the Superior Court's denial of his second postconviction motion, Johnson claims that, because his amenability hearing was flawed, the Superior Court lacked jurisdiction to convict him in 1998. The alleged flaw in the hearing process was that the same Family Court judge who presided over the "transfer hearing" also presided over the

² Supr. Ct. R. 25(a).

“adjudicatory hearing” in violation of previous Family Court Rule 170(c).³ Johnson further contends that the flawed amenability hearing constituted a “miscarriage of justice” that excuses any procedural default.⁴

(4) Johnson’s claim lacks factual support. Because Johnson was determined to be non-amenable to the Family Court’s rehabilitative process, his case was transferred to the Superior Court for adjudication. Thus, as the record reflects, a Family Court judge presided over Johnson’s “amenability” or “transfer” hearing and a Superior Court judge separately presided over the “adjudication.” Because there is no factual basis for Johnson’s claim that the merits of his untimely postconviction motion should be addressed due to a “miscarriage of justice,” we conclude that the Superior Court’s denial of his postconviction motion must be affirmed.

(5) It is manifest on the face of the opening brief that this appeal is without merit because the issues presented on appeal are controlled by settled Delaware law and, to the extent that judicial discretion is implicated, there was no abuse of discretion.

³ *State v. J.K. and R.T.*, 383 A.2d 283, 288 (Del. 1977).

⁴ Super. Ct. Crim. R. 61(i)(5).

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Henry duPont Ridgely
Justice